IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	**CRIMINAL ACTION**
v.	:	
IFEDOO NOBLE ENIGWE	:	**NO. 92-257**

DuBOIS, J. **April 18, 2005**

MEMORANDUM

Presently before the Court is the Motion of defendant, Ifedoo Noble Enigwe, to Quash Judgment Pursuant to Federal Rule of Criminal Procedure 12(b)(2) and defendant's Letter-Motion in Lieu of Motion for Reconsideration under Federal Rule of Civil Procedure 60(b). For the reasons set forth below, defendant's motions are denied.

I. BACKGROUND

The Court sets forth only an abbreviated procedural history as pertinent to the pending motions. A detailed factual and procedural history is included in the Court's previously reported opinions in this case. See United States v. Enigwe, 2003 WL 151385 at *2-6 (E.D. Pa. Jan, 14, 2003) (history of habeas proceedings); United States v. Enigwe, 212 F. Supp. 2d 420 (E.D. Pa. 2002); United States v. Enigwe, 2001 WL 708903, at *1-3 (E.D. Pa. June 21, 2001) (post-conviction procedural history); United States v. Enigwe, 1992 WL 382325, at *2-3 (E.D. Pa. Dec. 9, 1992) (factual history).

On May 6, 1992, defendant Ifedoo Noble Enigwe was charged in a four-count indictment with importing and trafficking in heroin. He was convicted by a jury on all four counts on August 12, 1992, and, on August 13, 1993, this Court sentenced him to, *inter alia*, 235 months

imprisonment and five years of supervised release. This sentence included a two-level enhancement for obstruction of justice and a four-level increase for defendant's leadership role in the offense, which together increased defendant's Guideline range from 121 – 151 months to 235 – 293 months. Defendant's conviction and sentence were affirmed on appeal by the Third Circuit in an unpublished decision on April 28, 1994. United States v. Enigwe, 26 F.3d 124 (3d Cir. 1994), cert. denied, 513 U.S. 950 (1994). Thereafter, defendant filed numerous habeas motions and related motions which will be discussed in this Memorandum only to the extent necessary to explain the Court's ruling on the pending motions.

II. Defendant's Motion to Quash Judgment Pursuant to Federal Rule of Criminal Procedure 12(b)(2)

Defendant argues, under Federal Rule of Criminal Procedure 12(b)(2), that this Court lacked jurisdiction to impose a two-level enhancement based on its determination that defendant committed perjury at trial because the offense of perjury was not found by a jury beyond a reasonable doubt. In support of his argument, defendant cites a footnote by Justice Scalia in Blakely v. Washington, 124 S. Ct. 2531, 2540 n.11 (2004), which states: "Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt [] as it has been for centuries . . . is unclear." It is defendant's position that Federal Rule of Criminal Procedure 12(b)(2) is a proper vehicle to challenge the Court's jurisdiction because jurisdictional claims can be raised at any time. Moreover, defendant argues that the government has "effectively waived the [jurisdictional] defense" because it was not addressed in the government's motion papers. (Def. Traverse at 2).

By proceeding under Rule 12(b)(2), defendant seeks to avoid the substantive gatekeeping provisions governing second or successive § 2254 habeas petitions. Section 2244(b)(3)(A) of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") limits a petitioner's ability to bring a second or successive habeas petition. A state prisoner seeking to file such a petition must first obtain an order from the Court of Appeals authorizing the district court to consider the motion.[1] See 28 U.S.C. § 2244(b)(3)(A). Relying on this Court's opinion in United States v. Enigwe, 17 F. Supp. 2d 390 (E.D. Pa. 2002), defendant reads the language of Rule 12(b)(2) to permit his claim that this Court lacked jurisdiction to increase defendant's sentence by two-levels for obstruction of justice. Id. at 392. In that opinion, the Court stated that "pursuant to Fed.R.Crim.P. 12(b)(2) and 12(f), defendants waive all but jurisdictional claims of error [based on defects in the indictment] unless they raise their claims before trial." Id. Defendant's reliance on that language is misplaced.

While it is correct that a claim based on lack of jurisdiction is not waived if not raised before trial, such a claim cannot be raised indefinitely. The Court addressed this precise question in an earlier opinion in this case, United States v. Enigwe, 212 F. Supp. 2d 420, 427-28 (E.D. Pa. 2002). That opinion dealt with defendant's Motion to Dismiss the Indictment Pursuant to Rule 12(b)(2) (Doc. No. 282, filed June 30, 2002). This Court rejected defendant's contention that a claim that the indictment failed to charge an offense could be raised at any time, ruling that

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[1] Specifically, AEDPA, 28 U.S.C. § 2255, provides that:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
> (1) [certain types of newly discovered evidence]; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

motions challenging an indictment based on the indictment's purported failure to charge an offense could be raised at any time "*during the pendency of the proceedings*," which concluded upon the completion of a defendant's direct appeal. Id. at 428 (emphasis added) (quoting Fed. R. Crim. P. 12(b)(2)).[2]

Rule 12(b)(2) provides that "at any time *while the case is pending*, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." Fed. R. Crim. P. 12(b)(2) (emphasis added). Thus, for purposes of Rule 12(b)(2), the time period for asserting a claim that this Court lacked jurisdiction to sentence defendant for obstruction of justice ended upon the completion of defendant's direct appeal in 1994.

Because relief under Rule 12(b)(2) is not available to defendant, the Court concludes that the relief defendant requests in the instant Motion – quashing that portion of the sentence imposed as a result of the perjury offense – should be characterized as a collateral attack on his conviction under 28 U.S.C. § 2255. Enigwe, 212 F. Supp. 2d at 428; see United States v. Miller, 197 F.3d 644, 647-49 (3d Cir. 1999) (discussing practice of characterizing post-conviction motions challenging validity of conviction as habeas petitions). However, before characterizing defendant's Motion as a collateral attack on his conviction under § 2255, Miller dictates that the Court consider whether defendant should receive notice that the motion will be construed as a

[2] At the time of the Court's decision in United States v. Enigwe, 212 F. Supp. 2d 420, 427-428 (E.D. Pa. 2002), Rule 12(b)(2) provided that defenses and objections based on lack of jurisdiction or failure to charge an offense "shall be noticed by the court at any time during the pendency of the proceedings." In 2002, the language of Rule 12(b)(2) was amended as follows: "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." According to the 2002 Advisory Committee Notes, the amendments to Rule 12(b) (except where noted) were stylistic and not intended to change practice.

habeas petition. Miller, 197 F.3d at 652.

The Court concludes, as it did in addressing this question in its July 30, 2002 Memorandum in this case, that notice to defendant is not required. See Enigwe, 212 F. Supp. 2d 420. In Miller, the rationale underlying the notice requirement – that notice should be given where the petitioner would lose the ability to file successive petitions absent certification by the courts of appeals – does not apply to "a prisoner who has already had one or more § 2255 motions dismissed on the merits, because the AEDPA leave-to-file requirement is already applicable to him." Enigwe, 212 F. Supp at 428 (quoting Roccisano v. Menifee, 293 F.3d 51, 58 (2d Cir. 2002). Because defendant in this case has had five post-AEDPA § 2255 petitions denied, he will not suffer the disadvantage with which Miller was concerned.

Based on the Court's conclusion that defendant's Rule 12(b)(2) Motion is in fact a habeas motion under § 2255, defendant is required to seek authorization from the Court of Appeals to file the motion. See 28 U.S.C. § 2244(b)(3). As defendant has failed to secure such authorization from the Court of Appeals, this Court lacks jurisdiction to decide the claim on its merits and must deny the motion.[3]

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[3] With respect to defendant's argument that the Court should not dispute whether Rule 12(b)(2) is an appropriate procedural vehicle for the instant motion because the government failed to address this issue in its motion papers, it is "widely recognized that judges have discretion to raise procedural issues in habeas cases." Long v. Wilson, 393 F.3d 390, 403 (3d Cir. 2004). "[I]t is not exclusively up to the parties to decide whether habeas procedural issues should be raised or waived. Id. at 403. In Long, the Third Circuit held that the district court could raise on its own motion the AEDPA statute of limitations defense because the AEDPA's promotes judicial efficiency, conservation of judicial resources, and safeguards the accuracy of state court judgment. Id. at 402 (citing Acosta v. Artuz, 221 F.3d 117, 123 (2d Cir. 2000) (holding that the authority of a district judge to raise procedural issues sua sponte is consistent with district court's power to review and dismiss habeas petitions prior to any responsive pleading by the state). Similar to other procedural bars to habeas review, the substantive gatekeeping provisions of the AEDPA furthers comity, finality, and federalism, and the interests

III. Defendant's Motion for Reconsideration of Apprendi Claims

Defendant seeks reconsideration under Federal Rule of Civil Procedure 60(b)(6) of this Court's July 30, 2002 Order denying his Apprendi claims on the ground that, *inter alia*, Apprendi does not apply retroactively to cases on collateral review. Defendant requests that the Court reconsider his Apprendi claims because of an intervening change in controlling law, specifically the recent Supreme Court cases of Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S. Ct. 738 (2005).

A. Standard of Review

Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[4] Klapport v. United States, 335 U.S. 601, 614-615 (1949); see also, Coltec Industries, Inc. v. Hobgood, 280 F.3d 262, 273 (3d Cir. 2002) (describing Rule 60(b)(6) as a "catch-all"). The general purpose of the Rule is "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978). "The decision to grant or deny relief pursuant to Rule 60(b) lies in the

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of society. See id. at 402-04. Therefore, it is appropriate for the court, sua sponte, to determine whether defendant can properly proceed under Rule 12(b)(2). See id.

[4] Rule 60(b) provides that on motion and upon such terms as a are just, the court may relieve a party or a party's legal representative from a final judgment order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgement is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

'sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances.'" Hernandez, 158 F. Supp. 2d at 392 (quoting Ross v. Meagan, 638 F.2d 646, 648 (3d Cir. 1981)). A "Rule 60(b) motion may not be used as a substitute for appeal." Smith v. Evans, 853 F.2d 155, 158 (3d Cir. 1988).

Defendant's Motion for Reconsideration rests on the ground that his sentence is unconstitutional in light of an intervening change in law. In addressing this claim, the Court notes that changes in decisional law generally do not support relief under Rule 60(b)(6). See Agostini v. Felton, 521 U.S. 203, 239 (1997) (observing that "intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)"). However, Rule 60(b)(6) relief may be, but is not necessarily, appropriate where there is a "a supervening change in governing law that calls into serious question the correctness of the court's judgment." United States v. Enigwe, 320 F. Supp. 2d 301, 308 (E.D. Pa. 2004) (citation omitted).

B. Use of Rule 60(b) for Relief Sought

Although the government does not argue that Rule 60(b) is an inappropriate procedural vehicle for obtaining the relief sought by defendant, the Court will briefly address this issue. On November 5, 2001, defendant, proceeding under Rule 60(b), filed a Motion for Reconsideration of this Court's Order of June 21, 2001 denying defendant's fifth habeas petition in which he claimed his sentence was unconstitutional in light of Apprendi. Before filing the Motion for Reconsideration in 2001, defendant sought authorization from the Third Circuit pursuant to 28 U.S.C. § 2244(b)(3). In granting defendant authorization to file the motion, the Third Circuit held that the AEDPA did not apply to defendant's Apprendi claims because he filed his habeas

petition before the enactment of the AEDPA. In re Ifedoo Noble Enigwe, No. 00-3558, slip op. (3d Cir. Dec. 8, 2000). The court also concluded that under pre-AEDPA law defendant had made a prima facie showing of cause and prejudice with regard to his Apprendi claims. Id. (citing In re Minarik, 166 F.3d 591, 609 (3d Cir. 1999)).

As discussed in its July 30, 2002 Memorandum, the Court permitted defendant to use Rule 60(b) to seek reconsideration of the Court's June 21, 2001 dismissal of his Apprendi claim, concluding that the Third Circuit's ruling excepted defendant's Apprendi claims from the substantive gatekeeping provisions of § 2255 ¶ 8.[5] Enigwe, 212 F. Supp. 2d at 430. The Court now holds, at it did previously that, "in light of the Third Circuit's determination that § 2255 ¶ 8 does not apply to defendant's Apprendi claims, defendant may seek this Court's reconsideration of its dismissal of those Apprendi claims under Rule 60(b)." Id. Therefore, the Court will turn to the merits of defendant's argument.

C. Retroactive Application of Blakely and Booker on Collateral Review

Defendant argues that his sentence is unconstitutional in light of the Supreme Court decisions in Blakely and Booker. Specifically, he contends that the addition of two levels for obstruction of justice (U.S.S.G. § 3C1.1) and four levels for his leadership role in the offense (U.S.S.G. § 3B1.1(a)) are unconstitutional because the Court did not submit the issues to a jury for a finding beyond a reasonable doubt. Thus, defendant argues, based on Blakely and Booker, six levels should be subtracted from the total offense level, resulting in a Guidelines Sentencing range of 121 – 151 months. As defendant has served more than 151 months, he contends he is

[5] In the Memorandum and Order dated July 30, 2002, the Court denied relief on the ground that Apprendi was not a retroactive rule and also rejected defendant's Apprendi claim on the merits. Enigwe, 212 F. Supp. 2d at 429-34.

entitled to immediate release.

In United States v. Aikens, 2005 U.S. Dist. LEXIS 2928 (E.D. Pa. Feb. 25, 2005), this Court held that Blakely and Booker do not apply retroactively to cases on collateral review. Courts in this Circuit have consistently had the same view. See, e.g., United States v. Russell, 2005 U.S. Dist. LEXIS 1610, 2005 WL 281183 (E.D. Pa. Feb. 3, 2005) (Bartle, J.); United States v. Wenzel, 2005 U.S. Dist. LEXIS 3898, 2005 WL 579064 *12 (W.D. Pa. Mar. 2, 2005) (McLaughlin, J.); United States v. Virelli, 2005 U.S. Dist. LEXIS 4531 (E.D. Pa. Mar. 22, 2005) (Baylson, J.).

As background, the Court begins its analysis with a review of Apprendi, Blakely, and Booker, and its holding in Aikens. See 2005 U.S. Dist. LEXIS 2928

In Apprendi, 530 U.S. 466 (2000), the defendant pled guilty to state firearm offenses and was sentenced to an enhanced sentence under the New Jersey hate crime law after the trial judge found by a preponderance of the evidence that the defendant had committed a hate crime. The Supreme Court, stating that the Due Process Clause requires that the findings upon which defendant's hate crime sentence was based must be proved to a jury beyond a reasonable doubt, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 471, 490.

In Blakely v. Washington, 124 S. Ct. 2531, the Supreme Court overturned a sentence imposed under Washington's sentencing system which permitted judges to enhance the sentences of defendants based on information that had not been proven beyond a reasonable doubt to a jury. The Court expanded the ruling in Apprendi which was limited to sentences which exceeded the

statutory maximum, concluding that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id. at 2536-537 (internal quotations omitted).

Finally, in United States v. Booker, 125 S. Ct. 738, the Supreme Court reaffirmed Apprendi and ruled that the holding in Blakely was applicable to the Sentencing Guidelines. On the latter issue the Court stated that the Sixth Amendment requires that a jury, not judge, find "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict." Id. at 750 (quoting Apprendi, 530 U.S. at 490). In addition, the Court declared that the Sentencing Guidelines were no longer mandatory, but merely advisory, and that the courts of appeals should review sentences for "reasonableness" in light of the statutory sentencing factors identified in 18 U.S.C. § 3553(a). Id. at 755, 767.

The Supreme Court decision in Teague v. Lane, 489 U.S. 288 (1988), governs whether the rules announced by the Supreme Court in Blakely and Booker apply retroactively to cases on collateral review.[6] The threshold determination in analyzing the retroactivity of a new rule of law is whether the rule is substantive or procedural in nature. United States v. Swinton, 333 F.3d 481, 487 (3d Cir. 2003). The Court finds that the Blakely and Booker are rules of criminal procedure because these decisions "dictate[] what fact-finding procedure must be employed to ensure a fair trial" and are not concerned with whether particular conduct is unlawful. See United States v. Jenkins, 333 F.3d 151, 154 (3d Cir. 2003) (quoting United States v. Sanders,

[6] In United States v. Enigwe, 212 F. Supp. 2d 420, 431 (E.D. Pa. 2002), this Court previously held in this case that Apprendi does not apply retroactively to cases on collateral review.

247 F.3d 139, 147 (4th Cir. 2001)); see also Swinton, 333 F.3d at 488-89 (finding Apprendi to be a procedural rule).

Teague outlined a three-step analysis for determining whether a particular rule is retroactive. O'Dell v. Netherland, 521 U.S. 151 (1997). First, the court must determine whether the defendant's conviction became final before the new decision he invokes. See Lewis v. Johnson, 359 F.3d 646, 653 (3d Cir. 2004). If the conviction had not yet become final, the defendant is entitled to the benefit of the decision. As defendant's conviction became final before Blakely and Booker were decided, he is not entitled to the benefit of those decisions unless the rules they announced are retroactive.

The second step is to determine whether the decision adopted a new rule of law. See id. at 654. If the decision did not adopt a new rule, the petitioner is entitled to the benefit of the decision. If a new rule was adopted, the court must determine whether one of the two Teague exceptions applies. A case announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301. Moreover, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Swinton, 333 F.3d at 489 (quoting Teague, 489 U.S. at 301).

The Supreme Court decision in Booker significantly altered the way federal courts utilize the Sentencing Guidelines. First, in the wake of Booker, the rule announced in Apprendi that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt" is now applicable to

sentences under the federal the Sentencing Guidelines. Booker, 125 S. Ct. at 756. Second, district courts are no longer bound to follow the federal Guidelines. Rather, sentencing courts are required to "consult [the] Guidelines and take them into account when sentencing." Id. at 767. Thus, the Guidelines, now advisory, permit courts "to tailor the sentence in light of other statutory concerns." Id. at 755.

Before the decisions in Blakely and Booker, courts held, without exception, that Apprendi was inapplicable if the sentence did not exceed the statutory maximum sentence. See, e.g., Simpson v. United States, 376 F.3d 679, 681 (7th Cir., 2004); United States v. Hughes, 369 F.3d 941, 947 (6th Cir. 2004);United States v. Francis, 367 F.3d 805, 820 (8th Cir. 2004); United States v. Jardine, 364 F.3d 1200, 1209 (10th Cir. 2004); United States v. Alvarez, 358 F.3d 1194, 1211-12 (9th Cir. 2004); United States, v. Cases, 356 F.3d 104, 128 (1st Cir. 2004); United States v. Phillips, 349 F.3d 138, 143 (3rd Cir. 2003); United States, v. Floyd, 343 F.3d 363, 372 (5th Cir. 2003). Therefore, at the time that defendant's sentence became final, a "reasonable jurist would not have felt compelled" to adopt the rule announced in Booker. See Teague, 489 U.S. at 301. For all of these reasons, the Court concludes that Booker's extension of Apprendi and Blakely to the federal Sentencing Guidelines established a new rule.[7]

The final step in the Teague analysis is to determine whether the new rule satisfies one of the two Teague exceptions. See Lewis, 359 F.3d at 654. If neither exception applies, the petitioner is not entitled to the benefit of the decision.

The first exception – that the rule places certain primary, private individual conduct

[7] By the same reasoning, the Court concludes that Blakely announced a new rule. However, the Court's analysis focuses on Booker because it is directly applicable to the instant case since Booker specifically addressed the constitutionality of the Sentencing Guidelines.

beyond the power of the criminal law-making authority to proscribe – is inapplicable to this case. Under the second exception, a new rule applies retroactively if it is "implicit in the concept of ordered liberty," implicating "fundamental fairness," and is "central to an accurate determination of innocence or guilt," such that its absence "creates an impermissibly large risk that the innocent will be convicted." Teague, 489 U.S. at 311-313; Swinton, 333 F.3d at 487.

The Supreme Court decision in Schriro v. Summerlin, 124 S. Ct. 2519 (2004), is instructive on this issue. In that case, the Court held that Ring v. Arizona, 536 U.S. 584 (2002), which extended the Apprendi rule to a death sentence imposed under the Arizona sentencing scheme, did not apply retroactively to cases on collateral review. Id. The Summerlin Court concluded that the rule announced in Ring did not demand retroactive application, holding "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge." Summerlin, 124 S. Ct. at 2523 (internal citations omitted). In reaching its decision, the Court concluded that judicial factfinding did not "seriously diminish" accuracy to the extent that there was an "impermissibly large risk" of punishing conduct the law did not reach. Id. at 2523.

This Court concludes that a similar analysis dictates that Booker is not a watershed rule. See In re Dean, 375 F.3d 1287, 1290 (11th Cir. 2004) (Summerlin "has strongly implied that Blakely is not to be applied retroactively."). Neither of Booker's holdings are "central to an accurate determination of innocence or guilt" such that there is "an impermissibly large risk" that the innocent will be convicted. Summerlin, 124 S. Ct. at 2523. "When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot

confidently say that judicial factfinding *seriously* diminishes accuracy." Id. at 2525 (emphasis in original). Similarly, Booker's holding that the sentencing guidelines are advisory, cannot be said to "seriously diminish" accuracy to the extent that there was an "impermissibly large risk" of punishing conduct the law did not reach. Teague, 489 U.S. at 312-13. Consequently, Booker is not a watershed rule of criminal procedure that should be applied retroactively to cases on collateral review.[8]

For the foregoing reasons, Booker is not applicable to defendant and his Motion for Reconsideration is denied.[9] Furthermore, the Court concludes that there are no "extraordinary circumstances" that warrant relief under Rule 60(b)(6). See Agostini, 521 U.S. at 239 (citing J. Moore et al., Moore's Federal Practice, § 60.48[5][b], p. 60-181 (3d ed. 1997) (collecting cases)); see also Marshall v. Board of Educ., 575 F.2d 417, 425 (3d Cir. 1978) (change in law not extraordinary).

D. Certificate of Appealability

In the Third Circuit, a certificate of appealability from the denial of a Rule 60(b) motion

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[8] The Third Circuit has had occasion to rule on Booker's retroactivity only once – in the context of an application to file a second or successive habeas corpus motion under 28 U.S.C. §2244(b)(3)(C). In re Olopade, 2005 U.S. App. LEXIS 5886 (3d Cir. April 11, 2005). Applying the standard applicable to that situation, distinguishable from that applicable to this case, the court denied a petitioner's request for leave to file a second or successive habeas motion because he could not make a "prima facie" showing that Booker constitutes "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255. Id. at *12.

[9] In defendant's final submission related to the pending Motion for Reconsideration, defendant argues that not applying Booker retroactively to cases on collateral review violates equal protection of the law. (Def. Reply at 10). The Third Circuit recently addressed this issue in Olopade, 2005 U.S. App. LEXIS 5886. The Court, in responding to the same argument, held that there was "an important distinction between cases on direct appeal and those on collateral review. Simply put, because prisoners seeking collateral review are not similarly situated to prisoners whose cases are on direct appeal, it is constitutionally permissible to apply different rules to the two different categories of prisoners." In re Olopade, 2005 U.S. App. LEXIS 5886, *9 (internal citations omitted).

is granted only if the petitioner makes: "(1) a credible showing that the district court's procedural ruling was incorrect; and (2) a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights." Morris v. Horn, 187 F.3d 333, 340 (3d Cir. 1999). The Court concludes that defendant has made such a showing, and therefore grants defendant a certificate of appealability on the issue of whether his sentence is unconstitutional in light of the Supreme Court decision in United States in Booker, 125 S. Ct. 738 (2005). While this Court has held that Booker does not apply retroactively to cases on collateral review, because the Third Circuit has yet to rule on this issue, this Court's "assessment of the constitutional claims could be debatable or wrong." See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

IV. CONCLUSION

For the foregoing reasons, the Court denies defendant's Motion to Quash Judgment Pursuant to Federal Rule of Criminal Procedure 12(b)(2) and Letter-Motion in Lieu of Motion for Reconsideration under Federal Rule of Civil Procedure 60(b). The Court grants defendant a certificate of appealability with respect to his claims in the Motion for Reconsideration that his sentence violates United States v. Booker, 125 S. Ct. 738 (2005).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	**CRIMINAL ACTION**
v.	:	
IFEDOO NOBLE ENIGWE	:	**NO. 92-257**

O R D E R

AND NOW, this 18th day of April, 2005, upon consideration of *pro se* defendant's Motion to Quash a Portion of This Court's Judgment Pursuant to Rule 12(b)(2), Fed.R.Crim. Proc. (Doc. No. 389, filed July 6, 2004), *pro se* defendant's Letter-Motion in Lieu of a More Formal Motion for Reconsideration of This Court's Denial of Defendant's Apprendi Claims by Order dated July 30, 2002 (Doc. No. 390, filed July 27, 2004); and the related submissions of the parties, **IT IS ORDERED** that*pro se* defendant's Motion to Quash a Portion of This Court's Judgment Pursuant to Rule 12(b)(2), Fed.R.Crim. Proc. (Doc. No. 389) and *pro se* defendant's Letter-Motion in Lieu of a More Formal Motion for Reconsideration of This Court's Denial of Defendant's Apprendi Claims by Order dated July 30, 2002 (Doc. No. 390) are **DENIED**.

IT IS FURTHER ORDERED that, based on the Court's conclusion that defendant has made a credible showing that the district court's procedural ruling was incorrect and a substantial showing of the denial of a constitutional right with respect to his claims that his sentence violates United States v. Booker, 125 S. Ct. 738 (2005), a certificate of appealability shall issue with respect to that claim asserted in the Motion for Reconsideration.

BY THE COURT:

JAN E. DuBOIS, J.